IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CIVIL REVISION APPLICATION NO.1791 OF 2001

WITH

CIVIL APPLICATION NO.151 OF 2003

In

CIVIL REVISION APPLICATION NO.1791 OF 2001

M/s.Dattani Constructions & Anr. : Petitioners
(Orig.Defendants)

V/s.

Shri Jagjivandas Ranchhoddas Panchal : Respondent
(Orig.Plaintiff)

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Mr.Rajiv Narula i/b. M/s.Jhangiani Narula & Associates for the petitioners.

Ms Mamta Sadh i/b. Zohair & Co., for the respondent.

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CORAM : S.A.BOBDE, J.

DATE : JULY 25, 2007.

P.C.

1. This Civil Revision Application is against the order dated 13.8.2001 by which the learned City Civil Court at Mumbai has set aside the earlier order dated 12.8.1997 dismissing the suit for default and has directed that the suit be restored to file. The respondent has sued the

appellants for a declaration and injunction for protecting the possession of the suit property. Pending the suit, the parties had entered into Consent Terms dated 22.10.1993 under which they agreed, inter alia, that the respondent shall remain in exclusive possession of the suit property and that the appellants would develop the suit property under a licence. At the end of the Consent Terms, they introduced a clause that the suit would be adjourned sine die. However, it is clear that though this was agreed to by the parties, the suit continued to appear on the board of the Court.

2. On 25.7.1997 when the suit appeared, the Advocate for the respondent appeared and asked for an adjournment on the ground that the suit would be withdrawn on the next date i.e. 12.8.1997. When the suit appeared on the board, none appeared for the parties and, therefore, the suit was dismissed. Thereafter, after passage of long time, the respondent moved an application on 23.7.2001 under Order IX Rule 13 for setting aside the dismissal.

3. This application for setting aside the dismissal was allowed by the Court mainly on the ground that the suit was wrongly dismissed for default since there was an agreement in the Consent Terms that the suit would be adjourned sine die. The Court was of view that the

restoration of the suit would amount to the variation of the Consent Terms. Further, the other reason why the Court restored the suit was that the suit could not have been dismissed unless notice is given to both the sides since both the parties had agreed by consent that the suit could be adjourned sine die.

4. Having heard the parties, I am of view that the Court below committed a material irregularity in the exercise of its jurisdiction. In the first place, the Court overlooked the fact that the agreement between the parties in the form of Consent Terms as a fact did not result in removing the suit from the board of the Court. The suit appeared on the board of the Court on 25.7.1997 when the Advocate for the respondent asked for an adjournment on the ground of withdrawal. Therefore, as observed by the Court, there was no question of giving any further notice of appearance of the suit before it was dismissed. Admittedly and clearly, the respondent had notice that the suit had appeared before the Court and, in fact, as observed earlier, the learned Advocate had asked for time to withdraw.

5. In any case, the order further suffers from an error of jurisdiction in that even though the suit was dismissed on 12.8.1997 and the application for setting aside the

dismissal was made on 23.7.2001, there is no discussion by the Court on the existence or otherwise of sufficient cause for condoning the delay in making the application for setting aside the decree. In any case, the learned trial Court was bound to deal with the question of delay, which was considerable, before allowing the application for setting aside the decree. Having regard to the circumstances of the case, I am of view that the impugned order deserves to be set aside and is hereby set aside.

6. Accordingly, the Civil Revision Application is allowed.

7. In view of the order passed in the Civil Revision Application, no order in Civil Application No.151 of 2003 and the same stands disposed of.

8. The learned counsel for the respondent prays for stay of the operation of this order. No reason for staying the order is made out. The oral application for stay is rejected.

S.A. BOBDE, J.